Message

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Subject: OCSPP News for October 5, 2021

OCSPP Daily News Round-Up

PFAS

- Inside EPA 10/04; Oklahoma Urges EPA To Adopt Phased Approach For RCRA PFAS Rules
- Inside TSCA 10/04; SBA Advocacy Seeks RFA Review, Flexibility On PFAS Reporting Rule
- Inside TSCA 10/04; EPA Touts Development Of PFAS Test Methods To Aid Regulatory Push
- The Hill 10/04; John Oliver on protecting against 'forever chemicals': 'It shouldn't just be on us as individuals'

Blog/OpEd/Other

- Beyond Pesticides 10/05; Federal Wildlife Agency Considers Endangered Status for American Bumblebee, But Will It Define Bee's "Critical Habitat"?
- Pesticide Law and Policy Blog 10/04; EPA Announces Updates on Its Efforts to Address PFAS in Pesticide Packaging
- Bergeson & Campbell Blogs 10/05; EPA Receives TSCA Section 21 Petitions Regarding Chemical Mixtures in Cigarettes and Cosmetics
- Mondaq (Taft Stettinius & Hollister) 10/05; EPA Releases New Testing Method In Ongoing Effort To Address PFAS Contamination In Pesticide Packaging
- Mondaq (Beveridge & Diamond) 10/04; Maine Adopts Broad Ban Of PFAS-Containing Products

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Oklahoma Urges EPA To Adopt Phased Approach For RCRA PFAS Rules

Jeremy Bernstein, Inside EPA
https://insideepa.com/daily-news/oklahoma-urges-epa-adopt-phased-approach-rcra-pfas-rules

Oklahoma's environment secretary is urging EPA to adopt a phased approach for regulating per- and polyfluoroalkyl substances (PFAS) under the Resource Conservation and Recovery Act (RCRA), warning that granting state and environmentalist petitions seeking a broad class-based system faces significant uncertainties and poses major liability risks.

"Based on recent legislative and regulatory activity at both the State and Federal level, it appears inevitable that PFAS contamination will ultimately be addressed through multiple environmental statutes and programs, including RCRA," Oklahoma Energy and Environment Secretary Ken Wagner writes in a Sept. 28 letter to Administrator Michael Regan.

"However, due to numerous scientific (human health and environmental, technological and regulatory uncertainties, [Oklahoma Department of Environmental Quality (ODEQ)] believes it may be premature at this point to list the entire class of PFAS compounds as hazardous under RCRA as requested in the petition," he adds.

Instead, Wagner, a former top Trump EPA advisor on state and local issues, urges EPA to initially focus any RCRA regulatory program on waste streams of "greatest concern," starting with wastes associated with firefighting foams, known as aqueous film forming foam (AFFF). The widely used substance contains perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), which are two of the most studied PFAS but have been phased out of production.

As part of this effort, EPA, in conjunction with the Defense Department (DOD), should consider developing a legacy firefighting foam collection and disposal program, Wagner writes.

EPA could also list additional PFAS waste streams or compounds once scientific and technological understandings advance, disposal methods and capacities increase and regulatory uncertainties decrease, Wagner adds.

His letter comes as EPA is in the midst of discussions with top environment officials from New Mexico, whose governor, Michelle Lujan Grisham (D), earlier this year petitioned EPA to designate PFAS either as a class, or individually by chemical, as hazardous waste under RCRA.

Grisham's petition piggybacks on two long-pending petitions by environmental advocates, including the Environmental Law Clinic at the University of California, Berkeley in January 2020 on behalf of Green Science Policy Institute and other environmental groups, and by Public Employees for Environmental Responsibility (PEER) in September 2019, both of which seek to secure a RCRA hazardous waste listing for PFAS.

The governor says the listing is needed to lay out a clear regulatory path under RCRA's cradle-to-grave waste management framework for states struggling with PFAS contamination, especially in the absence of any other EPA regulation. For example, New Mexico is currently fighting an attempt by the Air Force to sideline New Mexico's PFAS regulation in a hazardous waste permit for Cannon Air Force Base, with the military arguing the substances should be struck from the permit because EPA has not included them in the RCRA definition of hazardous waste.

While EPA had been subject to a statutory deadline to respond to the governor late last month, the agency, with the agreement of the state, recently delayed its final decision to allow the ongoing talks to continue.

In a statement to Inside EPA, an EPA spokesman said the agency "appreciates the input of our state partners, including Oklahoma, as the agency considers next steps to deliver critical protections to the American public from the risks associated with these chemicals. EPA has received the letter from Secretary Wagner and will review the information and recommendations provided by the state."

Regulatory Liability

In his letter, Oklahoma's Wagner urges EPA to continue taking steps under the Toxic Substances Control Act (TSCA) to eliminate uses of newer PFAS and prevent future contamination.

But he warns that the scientific, regulatory and waste [...]

SBA Advocacy Seeks RFA Review, Flexibility On PFAS Reporting Rule
David LaRoss, Inside TSCA
https://insideepa.com/tsca-news/sba-advocacy-seeks-rfa-review-flexibility-pfas-reporting-rule

The Small Business Administration (SBA) Office of Advocacy is accusing EPA of dodging legally mandated small entity review of its TSCA reporting rule for per- and polyfluoroalkyl substances (PFAS), and urging the agency to add several exemptions it says would ease compliance burdens for those companies.

In a Sept. 27 comment letter on EPA's Toxic Substances Control Act (TSCA) proposal, SBA's advocacy office says EPA is ignoring Regulatory Flexibility Act (RFA) mandates to review certain rules' impacts on small entities, undercounting compliance costs involved with the reporting mandate -- especially for makers and importers of finished articles -- and ignoring the toxics law's requirement to tailor data-gathering requirements to be as narrow as necessary to fulfil the agency's mission.

"Advocacy is concerned that the agency has improperly certified that this rule will not have a significant economic impact on a substantial number of small entities under the RFA. Advocacy is further concerned with small businesses' ability to comply with the rule due [to] its broad scope and applicability. Therefore, Advocacy believes that EPA must conduct a small business advocacy review panel . . . to assess the impact of the proposed rule on small entities, and to consider less burdensome alternatives," the letter says.

Convening a review panel, as required by the Small Business Regulatory Enforcement Act (SBREFA) for rulemakings expected to impact a significant number of small entities, could prompt EPA to add some of the reporting flexibility industry has sought but also delay final action on the policy.

Either would be a blow to environmentalists who are seeking a strict mandate to take effect in early 2022.

And the advocacy office notes three revisions it believes would ease compliance: offering exemptions "for small businesses who are not likely to produce responsive, reliable or any information at all;" crafting a "tiered and phased approach" to deadlines that would give small businesses more time to comply; and "[t]ailored guidance" on when information on PFAS in a company's products should be considered "reasonably ascertainable."

Despite EPA's position that Congress' mandate to gather data on PFAS manufacturing and importing requires reporting by "any person" who has manufactured or imported the chemicals since 2011 forbids it from offering exemptions, the office insists its preferred revisions are not only lawful but mandatory under TSCA.

"EPA has an affirmative duty to provide exemptions for this reporting rule under TSCA when certain factors are present," the letter says, noting that the law's section 8(a)(7) requires the agency go as far as feasible to avoid "reporting which is unnecessary or duplicative," to minimize compliance costs and to limit reporting rules "to those persons likely to have information relevant" to implementing its policy goals.

That aligns with industry commenters' calls for EPA to grant exemptions from the TSCA mandate for articles, de minimis amounts of PFAS, and other scenarios like chemicals used solely for research and development. However, chemical chief Michal Freedhoff's recent vow to extend TSCA regulation of products appears to render those requests unlikely at best.

Some groups have also suggested "tiered" reporting deadlines to give companies historically exempted from the toxics law more time to comply, and the SBA office backs those calls as well.

"The statute does not prescribe a single reporting deadline for all entities; therefore, EPA should allow for different compliance timelines based on the small business entities' abilities to provide the required information. For tiered reporting under this rule, EPA should consider a system of tiered reporting over an extended period, beginning with manufacturers and importers of bulk chemicals," the Advocacy letter says.

No 'First-Hand Knowledge'

The advocacy office argues that article manufacturers, especially small companies [...]

EPA Touts Development Of PFAS Test Methods To Aid Regulatory Push
Diana DiGangi, Inside TSCA
https://insideepa.com/tsca-news/epa-touts-development-pfas-test-methods-aid-regulatory-push

EPA has released a newly modified method of detecting per- and polyfluoroalkyl substances (PFAS) that it says allowed it to rule out contamination in several pesticides, just as agency scientists used an advisory board meeting to tout their work on a range of new methods that could aid efforts to identify specific sources of the chemicals.

The agency announced Sept. 29 the availability of an "oily matrix method," to identify a subset of PFAS in liquids -- and that it had already applied the new approach to verify that there were no PFAS in stored samples of an anti-mosquito pesticide that had been stored in fluorinated high-density polyethylene (HDPE) containers, as part of a broader investigation into whether those plastics transfer perfluorinated chemicals to other substances.

It also notes that the "oily matrix" test standard was modified from EPA's Method 537.1, which "is mainly used for drinking water and was previously used in analyzing PFAS in" the storage containers themselves.

"The new method is intended to help pesticide manufacturers, state regulators, and other interested stakeholders test oily matrix products for PFAS and join the effort in uncovering any possible contamination," EPA's release continues. "In a shared interest to remove PFAS from the environment, if companies find PFAS in their product, EPA is requesting that they engage in good product stewardship and notify the agency."

EPA said it used the oily matrix method to analyze three stored samples of Permanone 30-30 and PermaSease 30-30, two mosquito pesticides, and determined that the tested samples contained no PFAS at or above the method's detection limit.

That marks the latest step in the agency's response to findings that a shipment of the widely-used pesticide Anvil 10+10 had been contaminated with PFAS -- which EPA reportedly determined likely came from the HDPE containers it was stored in. Those findings, in turn, spurred renewed calls from environmentalists to limit use of the fluorinated plastics under the Toxic Substances Control Act and other laws.

However, according to the new announcement, officials have yet to find any other contamination from similar containers.

"To date, the only PFAS contamination in mosquito control pesticide products that the Agency has identified originated from fluorinated HDPE containers used to store and transport a different mosquito control pesticide product (Anvil 10-10)," the agency wrote.

The oily matrix method is just one of several new or improved PFAS detection standards EPA is developing as part of a push to make it easier to detect contamination from the chemicals -- an effort that officials highlighted at a meeting of the agency's Board of Scientific Counselors (BOSC) the same day as the pesticide announcement.

"A major goal is having some sort of screening tool where we can lump PFAS into a single measurement in a single class and say, here is all of the PFAS," Alice Gilliland, the director of EPA's Center for Environmental Measurement and Modeling (CEMM), said in a presentation to BOSC's executive committee Sept. 29.

"This is of interest to us in research, and also the program offices, either potentially as a screening tool as need for further analysis if you're over a certain level of fluorine, or potentially even regulatory in the future."

EPA Research

During the Sept. 29-30 BOSC meeting, EPA officials updated the panel -- which advises the agency on its research agenda -- on their development of PFAS detection methods, which they said has been particularly focused on meeting the diverse list of testing needs presented by the variety of media that PFAS can contaminate, such as water, other liquids like pesticides, animal tissue and indoor air.

For instance, Hannah Liberatore, a scientist at EPA's Office of Research and Development (ORD), said her team is working on methods to detect total organic fluorine levels -- a measure of all PFAS combined in any particular sample -- for [...]

John Oliver on protecting against 'forever chemicals': 'It shouldn't just be on us as individuals'
Adrian Horton, The Hill
https://www.theguardian.com/tv-and-radio/2021/oct/04/john-oliver-forever-chemicals

John Oliver explored the toxic, long-hidden toll of certain "forever chemicals" used in common household products – everything from cosmetics to food packaging to wood sealants and non-stick pans.

The group of chemicals known as PFAS, with strong carbon-flourine bonds, do not degrade in the environment, and have been linked to health issues such as high cholesterol, ulcerative colitis, pregnancy-induced hypertension, thyroid disease, testicular cancer, kidney cancer and decreased response to vaccines, "which is clearly terrible", the Last Week Tonight host said, "but also really shouldn't be that surprising to you seeing as the original name for this show was 'That Thing You Like Is Bad with Saddy Longlegs'."

These "forever chemicals" are estimated to have lifetimes in the thousands of years, and exposure has been linked to fertility problems, changes in metabolism, and an increased risk cancer, yet much remains unknown about their long-term consequences.

Oliver dug into the long history of PFAS's corporate cover-up: the chemical PFOA, also known as C8, was first sold in 1951 by a company called 3M to chemical company DuPont, which used it to make Teflon, used for non-stick pans. Decades ago, as DuPont marketed Teflon to families, 3M already knew that some PFAS accumulated in humans and animals, that they did not degrade in the environment, and that they could increase the size of the liver in rats, rabbits and dogs.

In 1981, 3M found that ingestion of PFAS caused birth defects in rats; DuPont, once informed, tested children of employees in their Teflon division and found that two, of seven births, had eye defects – information the company did not make public.

By 1991, 3M told DuPont that under no circumstances should it ever dump PFOA into waterways; the company continued to do so, losing track of the amount it put into the environment. "Harmful chemicals are just not something you should lose track of," Oliver said. "They're not your car keys or your middle child."

Even worse, in 1993, DuPont developed a viable alternative to C8 that was less toxic and stayed in the body for less time, but the company decided against it – the risk to its bottom line was too great, as Teflon products were worth $1bn in annual revenue, "proving once and for all corporations truly are people – specifically, sociopaths", said Oliver.

"And if you are wondering where the EPA [Environmental Protection Agency] was in all this, you should know they were more than a little hamstrung here," he continued. Under the 1976 Toxic Substances Control Act, the agency could only require testing for chemicals when it was provided evidence of potential wrongdoing – a set-up that "largely allows chemical companies to regulate themselves", said Oliver, "which is an absolutely terrifying sequence of words, right up there with incoming FaceTime with Jeffrey Toobin".

The most shocking discovery, Oliver continued, came in the 1970s, when Dupont and 3M started testing workers for PFAS levels in their blood. 3M wanted a control group of clean blood to measure against, but the company couldn't find any uncontaminated blood – not from its workers, nor Americans, or even random people from across the world. As subsequent studies have found, C8 is in the blood of 99.7% of Americans, "meaning at the very least, Vin Diesel and I finally have something in common", Oliver quipped.

Starting in 2015, Dupont phased out C8, but it did keep using a different PFAS known as GenX, production of which it spun off into a separate company, Chemours. "The problem is: if and when GenX is eventually found to be harmful, companies can presumably just move on to another one, then another one, and so on and so on," said Oliver.

You don't necessarily need to throw away your pans, Oliver reassured – experts say it's unlikely PFAS will be released if the pans aren't overheated or scraped. However, there is more risk of exposure from stain-proof or waterproof clothing that contains [...]

Federal Wildlife Agency Considers Endangered Status for American Bumblebee, But Will It Define Bee's "Critical Habitat"?

NA, Beyond Pesticides

https://beyondpesticides.org/dailynewsblog/2021/10/federal-wildlife-agency-considers-endangered-status-for-american-bumblebee-but-will-it-define-bees-critical-habitat/

The U.S. Fish and Wildlife Service (USFWS) will consider listing the American bumblebee (Bombus pensylvanicus) under the Endangered Species Act, according to a notice published in the Federal Register late

last month. Earlier this year, the Bombus Pollinator Association of Law Students at Albany Law School and the Center for Biological Diversity petitioned the agency to list the species. USFWS review of the petition indicates that it found "substantial scientific or commercial information indicating that the petitioned actions may be warranted," and will determine over the next year whether final listing and further protective actions are warranted.

With the American bumblebee experiencing an 89% decline in its population over the last 20 years, scientists and advocates believe it is critical for USFWS to take steps to protect what remains of this iconic species. At one time, the American bumblebee's range extended from eastern Canada south through the United States into Florida, and as far west as California. Oregon is the only state in the continental US where the species has never been spotted. Declines are particularly pronounced in the northern part of its range, where recent sightings are nil, and assessments for states like New York, Michigan, and West Virginia indicate the species is subsisting at 1% of its historical population levels. While populations are slightly more stable in its southern range, overall abundance is rapidly dropping in states like Arkansas and Georgia, which have experienced 72% and 74% declines, respectively.

Like the Rusty-patched bumblebee, which was recently listed as endangered by USFWS, declines are related to pesticide use, habitat loss, climate change, and disease spread. While bumblebees are generalist foragers, each year a multitude of factors must come together to ensure their population grows. Choosing a spot to nest and overwinter can be fraught with challenges. American bumblebees often nest on the surface, right below ground, or in old logs with mere inches of cover (usually consisting of leaves and twigs). While queen bumblebees do their best to find a quiet, undisturbed site, human activity – ranging from tillage and other agricultural activities to site preparation and construction can destroy overwintering colonies. Mistiming arousal from hibernation with the availability of floral resources due to climate change can likewise stress bumblebees. To respond to climate change, bumblebees must be successful in both moving from away from inhabitable locations and building their population in these new locations – the American bumblebee has so far failed in both accounts. While foraging, diseases can spread between domesticated pollinators and wild bumblebees.

Pesticide use represents one of the most significant threats to bumblebees, and places their entire life cycle at risk. A 2018 study found that commonly used neonicotinoid insecticides begin to kill off bumblebees during their nest building phase, as exposure makes it more difficult for a queen to establish a nest. Then, even if they are successful in setting up a nest, neonicotinoids inhibit bumblebee queens from laying eggs, according to a 2017 study. Exposure to neonicotinoids unsurprisingly results in bumblebee colonies that are much smaller than colonies not exposed to the systemic insecticide, per research published in 2016. And the workers that hatch from these pesticide-exposed queens, that are likely to again be exposed in the field? A 2017 study finds that neonicotinoid exposure decreases pollination frequency and results in fewer social interactions. That is likely because neonicotinoids alter bumblebee feeding behavior, and degrade the effectiveness of bumblebee's classic "buzz pollination" process.

It is evident that while each of the factors contributing to the decline of the American bumblebee are problematic in their own right, pollinators are exposed to multiple stressors at once. When looking at [...]

EPA Announces Updates on Its Efforts to Address PFAS in Pesticide Packaging
Lisa M. Campbell and Lisa R. Burchi, Pesticide Law and Policy Blog
http://pesticideblog.lawbc.com/entry/epa-announces-updates-on-its-efforts-to-address-pfas-in-pesticide-packaging

On September 29, 2021, the U.S. Environmental Protection Agency (EPA) announced developments in its efforts to address per- and polyfluoroalkyl substances (PFAS) in the environment. In particular, EPA provided

an update on its progress in testing pesticide products and containers for PFAS.

EPA states that as part of its ongoing efforts, it is releasing an internally validated method for the detection of 28 PFAS compounds in oily matrices, such as pesticide products formulated in oil, petroleum distillates, or mineral oils. According to EPA, the oily matrix method is modified from EPA Method 537.1, a method that is mainly used for drinking water and was previously used in analyzing PFAS in fluorinated high-density polyethylene (HDPE) containers.

The new method is intended to assist pesticide manufacturers, state regulators, and other interested stakeholders in testing oily matrix products for PFAS and joining efforts to detect any possible contamination. In the announcement, EPA states: "In a shared interest to remove PFAS from the environment, if companies find PFAS in their product, EPA is requesting that they engage in good product stewardship and notify the Agency."

In developing this method, EPA collaborated with the Maryland Department of Agriculture. As part of this collaboration, the method was used to analyze three stored samples of mosquito control pesticide products as well as samples obtained directly from the product line from the pesticide manufacturer. EPA determined that none of the tested samples contained PFAS at or above EPA's method limit of detection.

EPA states that its investigation continues to determine the scope of this issue and its potential impact on human health and the environment. EPA acknowledges that "[t]o date, the only PFAS contamination in mosquito control pesticide products that the Agency has identified originated from fluorinated HDPE containers used to store and transport a different mosquito control pesticide product." EPA will continue to test additional fluorinated containers to determine whether they contain and/or leach PFAS and will present those results when the studies are complete. EPA further states it is working with other federal agencies and trade organizations to raise awareness of this issue and discuss expectations of product stewardship. EPA also is encouraging the pesticide industry to explore alternative packaging options, such as steel drums or non-fluorinated HDPE.

EPA Receives TSCA Section 21 Petitions Regarding Chemical Mixtures in Cigarettes and Cosmetics
Lynn L. Bergeson and Carla N. Hutton, Bergeson & Campbell Blogs
http://www.tscablog.com/entry/epa-receives-tsca-section-21-petitions-regarding-chemical-mixtures-in-cigar

On August 2, 2021, the U.S. Environmental Protection Agency (EPA) received a petition under Section 21 of the Toxic Substances Control Act (TSCA) seeking a rule requiring cigarette manufacturers to eliminate the hazardous chemicals used and to develop new product designs that eliminate or reduce the cigarette butt disposal risks to the environment. Filed by William David Bush, the petition states that the more than 4,000 chemicals in cigarette smoke come from chemicals within the soil, the paper surrounding the tobacco column, and the manufacturing process, while others are deliberately added. According to the petition, cigarette butts endanger the health of the environment, comprising 30-40 percent of items collected in annual coastal/urban cleanups. Organic compounds "seep from cigarette butts into aquatic ecosystems, becoming acutely toxic to fish and microorganisms." The petitioner asks EPA to:

Determine that the chemical mixtures contained within cigarettes present an unreasonable risk of injury to health and the environment;
Order by rule that cigarette manufacturers eliminate the hazardous chemicals used in a mixture with tobacco, including but not limited to the toxic substance inclusions resulting from tobacco growing or handling techniques;
Order by rule that cigarette manufacturers develop new product designs that eliminate or reduce the cigarette butt disposal risks to the environment.
EPA acknowledged receipt of Bush's petition on September 9, 2021, stating that it will grant or deny the

petition by October 31, 2021.

EPA received a second TSCA Section 21 petition from Bush on August 16, 2021, seeking a determination that the chemical mixtures contained within cosmetics present an unreasonable risk of injury to public health and the environment. According to the petition, since 2009, almost 600 cosmetics manufacturers have reported using 88 chemicals in more than 73,000 products that have been linked to cancer, birth defects, or reproductive harm. The petition states that these toxic chemicals have been banned by the European Union (EU) "and many other nations." The petition notes that Congress has not given the Food and Drug Administration (FDA) the authority to regulate the chronic risks posed by chemicals and contaminants in cosmetics and that FDA does not have the power to suspend registration or order recalls when products pose a risk of serious adverse health consequences or death. The petition asks that EPA order by rule that cosmetic manufacturers eliminate hazardous chemicals used in mixtures, stating that examples include formaldehyde, paraformaldehyde, methylene glycol, quaternium 15, mercury, dibutyl and diethylhexyl phthalates, isobutyl and isopropyl parabens, long-chain per- and polyfluoroalkyl substances (PFAS), and m- and o-phenylenediamine.

EPA acknowledged receipt of Bush's second petition on September 20, 2021, stating that it will grant or deny the petition by November 14, 2021.

EPA Releases New Testing Method In Ongoing Effort To Address PFAS Contamination In Pesticide Packaging
Aren Olson and E. Chase Dressman, Mondaq
https://www.mondaq.com/unitedstates/environmental-law/1118056/epa-releases-new-testing-method-in-ongoing-effort-to-address-pfas-contamination-in-pesticide-packaging

The Environmental Protection Agency (EPA) has recently released an agency-validated analytical method for identifying over two dozen per- and polyfluoroalkyl substances (PFAS) in oily matrices. The new analytical method aims to help pesticide manufacturers, state regulators, and other interested parties test pesticide products for PFAS compounds in response to recent surprising testing that detected PFAS in EPA-registered pesticide products.

Late last year, EPA received data showing PFAS compounds in an EPA-registered pesticide called Anvil 10+10, and, upon investigation, EPA concluded that the source of the PFAS contamination was the fluorinated HDPE containers used to store and transport the product. PFAS compounds in the containers leached into the pesticide product during storage and transport.

EPA's new analytical method forms part of the agency's ongoing efforts to ascertain the full scope and extent to which PFAS leaching has affected pesticide products in the United States. According to EPA, the new analytical method can detect 28 different PFAS compounds in oily matrices, including pesticide products formulated in oil, petroleum distillates, and mineral oils. The specific testing procedures are explained in an EPA memorandum titled "EPA's Analytical Chemistry Branch Method for the Analysis of PFAS in Oily Matrix," which is available here.

Companies operating in the pesticide industry should both take note of EPA's recent analytical method and stay abreast of EPA's ongoing PFAS investigation. At present, EPA is still investigating the full scope of environmental impacts associated with the use of fluorinated HDPE containers, and EPA has promised to provide further guidance to parties affected by packaging-related PFAS contamination in pesticides.

Maine Adopts Broad Ban Of PFAS-Containing Products

Ryan J. Carra , Deepti B. Gage , Nessa Horewitch Coppinger and Graham C. Zorn, Mondaq

https://www.mondaq.com/unitedstates/environmental-law/1117962/maine-adopts-broad-ban-of-pfas-containing-products?

Key Takeaways

What is Happening? On July 15, 2021, Maine adopted a law that will ban the use of perfluoroalkyl and polyfluoroalkyl substances (PFAS) in products. While the law takes a phased approach over the next few years, it will essentially ban the sale of new products that contain intentionally added PFAS starting January 1, 2030. Maine's Department of Environmental Protection (Maine DEP) will be empowered to enact exemptions by designating certain uses as currently unavoidable. The law also requires manufacturers of products containing intentionally added PFAS to notify the Maine DEP of such products and uses beginning January 1, 2023.

Who is Impacted? Manufacturers, distributors, and retailers who sell new products containing intentionally added PFAS.

What Should I Do? Product manufacturers should work with supply chain partners to confirm whether their products contain intentionally added PFAS. If so, product manufacturers should begin gathering information to provide the required notice to the Maine DEP by January 1, 2023.

What are PFAS?

PFAS are human-made chemicals that, according to U.S. EPA, are used across a variety of industries for manufacturing and in products including stain- and water-repellent fabrics, nonstick products, polishes, waxes, paints, cleaning products, fire-fighting foams, and other materials. The Maine law defines PFAS as "substances that include any member of the class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom."

Notification Requirements

Under the new law, manufacturers of all new products containing intentionally added PFAS must notify the Maine DEP of their use of PFAS for each of their PFAS-containing products starting January 1, 2023. The law defines "intentionally added PFAS" as "PFAS added to a product or one of its product components to provide a specific characteristic, appearance or quality or to perform a specific function...[and also] includes any degradation byproducts of PFAS." The notification must include: a description of the product, the purpose of using PFAS in the product or a product component, the precise amount of each type of PFAS in the product, the contact information of the manufacturer, and any additional information required by the Maine DEP. The Maine DEP may require a fee to be paid by the manufacturer upon submission of the required notification information.

With the Maine DEP's approval, a manufacturer may supply the information required for a product category or type rather than for each individual product. The Maine DEP may also waive the notification requirement where it determines substantially equivalent information is already publicly available and it may also extend the notification deadline if more time is needed for a manufacturer to comply. Notification is not required where regulation is preempted by federal law and for products governed by Maine's toxic chemicals in packaging and food packaging laws (Title 32, Chapters 26-a, 26-b).

If the Maine DEP has reason to believe a product contains intentionally added PFAS and proper notification was not provided, the Maine DEP may require the manufacturer to, within 30 days, either (a) provide the department with an attestation that the product does not intentionally contain PFAS or (b) notify sellers of the product in Maine that the sale of the product is prohibited and provide information of those notified to the department.

Prohibition on Use in Products

The Maine law takes a phased approach by initially banning new carpets, rugs, and fabric treatments that contain intentionally added PFAS as of January 1, 2023. Starting January 1, 2030, the sale or distribution of any new product containing intentionally added PFAS will be prohibited. Through the rulemaking process, the

Maine DEP may also, even before 2030, prohibit product categories or uses if they contain intentionally added PFAS.

The Maine law does not incorporate exemptions common in laws [...]

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